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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 606

EUGENE ORME, individually and as executor under the last will and testament of Louise de Haven, deceased,

vs.

THE NORTHERN TRUST COMPANY, a corporation, et al.

ADELHEIDT AUGUSTA NINA EDWINA von HARDENBERG and IRMGARD STELLA von ALTEN,
Petitioners,

J. HOWARD McGRATH, Attorney General of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Adelheidt Augusta Nina Edwina von Hardenberg, and Irmgard Stella van Alten, by Roland Towle, their counsel, respectfully shows to this honorable court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

The Supreme Court of Illinois, in a decison which became final on November 27, 1951, held that the attorney general of the United States, under the Trading with the Enemy Act, could, in 1949, vest the interest of petitioners in property in this country and also held that the judiciary is impotent to inquire into the efficacy of an act purporting to be exercised as a war power. Since the decision, which is reported in 410 Ill. 354, affects the title, rights, privileges and immunities of petitioners, they file this petition to review said decision.

STATEMENT OF FACTS.

In 1873, Louisa G. Bigelow, an American citizen, died in Switzerland, leaving a will which created a trust for the lives of her three granddaughters. The last grandchild died February 4, 1951. The trust is still in existence (R. 39).

One of the granddaughters, Louise de Haven, in 1941, attempted by her will to devise and bequeath her interest in that trust to plaintiff below, a stranger. Petitioners are daughters and the only heirs of Louise de Haven and contend that under the terms of the will of Louisa G. Bigelow, Louise de Haven had no vested right in the trust which she could dispose of by will (R. 39).

In 1943, Eugene Orme, plaintiff below, filed the instant suit to construe the Bigelow will and made petitioners parties defendant. That suit is still pending and undisposed of and no decree finding the rights of the various parties has been entered. Petitioners were served by publication and because they resided in Germany were unable, during the hostilities of World War II, to appear and defend in their own persons. Under authority of the Trading with

the Enemy Act (40 Stat. 411) the then Alien Property Custodian filed his appearance for petitioners and proceeded to represent them (R. 39).

Tom C. Clark, then the Attorney General of the United States on March 29, 1949, and on April 27, 1949, without notice to petitioners and without a hearing, issued two vesting orders by which he attempted to vest in himself the interest of petitioners in said trust. The interest of petitioners in said trust amounts to more than $600,000 (R. 40).

The Attorney General thereafter filed a petition to remove petitioners from said case and to substitute himself as defendant in lieu of petitioners (R. 40). Petitioners answered said petition claiming the attempt to dismiss them as parties defendant and to take their interest in the trust violated the due process clause of the Federal constitution. The claims of Eugene Orme and the other parties to this litigation are not involved, nor is a construction of the Bigelow or de Haven wills involved. The trial court granted the prayer of the petition. Petitioners appealed to the Illinois Supreme Court (R. 40).

The Illinois Supreme Court affirmed, holding that the courts are impotent to question the acts of officials allegedly purporting to act under war powers. That court characterized the seizure as unwarranted and unnecessary (R. 43).

JURISDICTIONAL STATEMENT.

The decision of the Supreme Court of Illinois was entered on November 27, 1951 (R. 38). No petition for rehearing was filed. The decision became final on that date. The Supreme Court of Illinois is the court of last resort in the state of Illinois. The jurisdiction of this court is invoked under Section 1257(3), Title 28, United States Code, Judiciary and Judicial Procedure.

The federal questions were specifically raised at the in-

ception of the claim of the attorney general when petitioners filed their answer to his petition (R. 40). Petitioners set up in their answer that the vesting order deprived them of their property without due process of law in violation of the fifth amendment of the constitution of the United States. Tne federal questions were issues before the Illinois Supreme Court and were the basis for its decision.

QUESTIONS PRESENTED.

1. In 1949, were petitioners "persons" within the meaning of the constitutional provision that "no person shall be . . . deprived of life, liberty, or property, without due process of law?

2. Did the attorney general of the United States have the right, in 1949, to vest the property of petitioners under authority of the Trading with the Enemy Act?

3. Is the judiciary impotent to inquire into the efficacy of acts allegedly exercised under war power?

REASONS FOR GRANTING THE WRIT.

1. The attempted seizure in 1949 violated the due process clause of the United States constitution.

2. The decision below raises questions of substantial importance involving a construction of the Trading with the Enemy Act and the United States constitution. Petitioners believe this is the first case to reach this court in which the right to vest, as late as 1949, has been questioned.

3. The Illinois Supreme Court, while characterizing the seizure as unwarranted and unnecessary, held the judiciary is impotent to inquire into acts allegedly done under war powers. It is the belief of petitioners that the judiciary is

not impotent to inquire into such acts and that this court will inquire into an unnecessary and unwarranted seizure. The decision of the Supreme Court of Illinois in that respect is in conflict with decisions of this court.

4. While the amount involved, which is in excess of $600,000, is substantial, a decision will involve much more property and the rights of many more people because of the continued vesting by the attorney general.

CONCLUSION.

WHEREFORE, your petitioners pray that a writ of certiorari issue directed to the Supreme Court of Illinois, to the end that these substantial issues may be determined by this court: that the decision below be reversed by this court and that the petitioners may be granted such other and further relief as to this court shall seem meet.

Dated this 15th day of February, 1952.

Adelheidt Augusta Nina Edwina von Hardenberg and Irmgard Stella von Alten,

Petitioners.

By: ROLAND TOWLE,

Counsel for Petitioners.

IN THE

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Illinois in this cause (R. 39) is reported in 410 Ill. 354.

JURISDICTION.

The judgment of the Supreme Court of Illinois became final November 27, 1951.

The statutory provision which is believed to sustain the jurisdiction of this court is section 1257(3), Title 28 U. S. Code, Judiciary and Judicial Procedure. This petition is filed within ninety days of the entry of such final judgment as required by section 2101(c), Judicial Code. One of the issues below was whether the United States Attorney General, in 1949, had a right to vest the interest of petitioners, nationals of Germany, in property in Cook County, Illinois, under alleged authority of the Trading with the Enemy Act. The other issue was whether or not the judiciary is impotent to inquire into the efficacy of acts allegedly done under war powers. The Illinois Supreme Court, in its opinion, held that although the seizure was unwarranted and unnecessary, the courts cannot inquire into any act which is allegedly done under a war power, even though the hostilities had been over for four years. A statement of the proceedings below leading to final judgment is contained in the preceding petition which is hereby adopted and made a part of this brief.

STATEMENT OF THE CASE.

Petitioners, who are sisters, have at all times resided in Germany. Their mother was one of three life tenants under a trust created in 1873 by petitioners' great grandmother. The trust has been in existence continuously in Cook County, Illinois, since 1873. It consists in the main, of the fee in the land upon which is built one of the large department stores on State Street in Chicago. The mother of petitioners died, testate, in California, in 1941. In her

will, she attempted to devise and bequeath her interest in that trust to Dr. Eugene Orme, a stranger. In 1943, Dr. Orme filed the instant suit to construe the 1873 will, contending the mother of petitioners had a right to devise her interest in that trust to him. Dr. Orme made petitioners parties defendant. Because of the war with Germany, notice of the pendency of the suit was not given petitioners. Their appearance was filed by the Alien Property Custodian under authority of the Trading with the Enemy Act.

The office of Alien Property Custodian was abolished in 1946, and the powers of that office were transferred to the Attorney General. The Attorney General did not attempt to vest the interest of petitioners in that trust until the spring of 1949, and not until the Trading with the Enemy Act was amended in 1948. Until that date, it was not a confiscatory act, but by that amendment, which provided that property vested should never be returned to the former owners, it became for the first time a confiscatory measure.

SPECIFICATIONS OF ERROR.

The Supreme Court of Illinois erred in failing to hold the attempt to vest the property of petitioners in 1949 violated the Fifth Amendment of the Constitution of the United States.

It also erred in holding the judiciary is impotent to inquire into the efficacy of any acts allegedly done under war powers.

ARGUMENT.

I.

The attempt in 1949, to vest the property of petitioners, violates the due process clause of the United States Constitution.

The office of Alien Property Custodian, under the Trading with the Enemy Act, was abolished in 1946, and the powers under that act were transferred to the Attorney General. The Attorney General, in 1946, declared that nationals of Germany, who inherited property from Americans, who died after 1947, could receive the property so inherited. An "enemy" alien cannot receive property inherited from nationals of this country while his status as an enemy exists. Since the Attorney General has declared that residents of Germany may inherit such property after 1946, they, therefore, were no longer "enemy" aliens. If they were no longer "enemy" aliens for that purpose, they are not "enemies" for any other purpose.

Petitioners not having been enemies since 1946 are then protected in their property rights under our Constitution. This court held, in *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 489 (1931), that aliens are entitled to the protection of the Fifth Amendment to the Constitution.

On June 5, 1945, the allied powers destroyed the German Sovereign by the Declaration of Berlin. A condominium was established and the former German State was divided into four sectors. From that day forward Germany as a nation ceased to exist; her sovereignty had been destroyed and the allies proclaimed total conquest. We were no longer at war with Germany, for the indispensible element in war is two

separate political bodies. *Bass* v. *Tingy*, 4 Dall. 37, 1 L. Ed. 731; *O'Neil* v. *Central Leather Co.*, 94 A. 789, 87 N.J.L. 552.

The petitioners were no longer "residents within the territory of any nation with which the United States was at war" (Sec. 2(a) definition of an enemy). They were residents of a territory governed by a comdominium of France, Britain, Russia and the United States. Any enemy taint that had attached to them because of their unfortunate geographic location was completely removed by the Declaration of Berlin.

From the date of that declaration they no longer were residents "within such territory of any nation with which the United States is at war." Petitioners as residents of a territory occupied by the allies were aliens, but they were not enemy aliens.

The official reasons for the adoption of the Trading with the Enemy Act, as published in "Bulletin of Information issued by Alien Property Custodian (Government Printing Office, Washington, 1018 P 8) were (1) to prevent aid and comfort to enemies and (2) to make available for war financing, such funds in this country as belonged to enemies. By its very nature, that act was not confiscatory. Its purpose was to strengthen this country and weaken the enemy during actual conflict. In 1948, the Trading with the Enemy Act was amended to provide that property vested under the Act should never be returned to the former owners thereof and should be covered into the treasury. It was not until after that amendment that the attorney general attempted, in March and April of 1949, to vest the property of petitioners. On the theory he had power to vest, the attorney general in 1949, 1950 and 1951, issued many vesting orders affecting millions of dollars of property and affecting the lives of many persons, in addition to petitioners. The attempt of the attorney general to vest

the property of petitioners on the theory that they were "enemy" aliens is contrary to his declaration that nationals of Germany could inherit property from Americans who died after 1946.

The policy of the attorney general to vest in 1949 is contrary to the public policy of this country under which the United States spent billions of dollars through the Marshall Plan. It seems absurd to make billions of dollars available to Germany and at the same time prevent nationals of that country from using their own funds for their own economic recovery. It is petitioners' belief that the power to vest in 1949 was then dormant.

Section 2 of the Trading with the Enemy Act defines its terminal facilities to be the proclamation of exchange of ratification of the treaty of peace. Because of the conduct of Russia, we are unable to enter into a treaty of peace, although we have in every other respect considered ourselves at peace with Germany. We have exchanged mail, tourists, students, resumed trade and diplomatic relations and have spent billions of dollars to rehabilitate Germany. Yet, because this country is effectively prevented from actually signing a treaty of peace, the attorney general interminably claims the right to vest under the act. When the Trading with the Enemy Act was passed in 1917, there was no thought in the minds of Congress in defining the duration of power under the act that a condition would arise which presently prevents us from making a treaty of peace with Germany. The seizure, in 1949, is contrary to equity and contrary to fundamental constitutional rights.

II.

The judiciary is not impotent to inquire into the efficacy of powers allegedly exercised under the various war power acts.

It was the position below of the attorney general that the question of whether to vest or not to vest was a matter of effective discretion and when a public officer had apparent authority to take an action under a war power, his act was not subject to judicial review. He cited as authority for that proposition the case of *Hirabayashi* v. *United States*, 320 U. S. 81, 93; 87 L .Ed. 1774, 1782 (1943); *United States* v. *Bush & Co.*, 310 U. S. 371, 380; 84 L. Ed. 1259, 1262 (1940) and *Friedman* v. *Schwellenbach*, 159 F. 2d 22, 25 (C.A.D.C., 1946), cert. den., 330 U. S. 838, 91 L. Ed. 1285 (1947).

Evidently those cases impressed the lower court, because it actually held:

> "It is not for us to inquire into the purposes of the government in making this seemingly unwarranted and unnecessary seizure. We may or we may not agree with the course followed in vesting these interests. But we are not permitted to speculate as to the reasons for the action taken. It is not for the courts to examine economic or political aspects of the policy established by the departments of government in the fields of their authorized discretion. . . . Courts may inquire whether an act passed by Congress is within the scope of its constitutional power. Beyond this they may not go and cannot extend their inquiry to a review of legislative policy. The wisdom or soundness of theory or principle are matters solely for the judgment of Congress and such matters are not within the range of judicial cognizance."

It is petitioners' belief that, while the effects of war under modern conditions may be felt for years, that nevertheless,

if war powers can be used in days of peace, they may obliterate the protection granted by our constitution. The question whether the war power has been properly employed is open to judicial inquiry. *Hamilton* v. *Kentucky, Distillery Co.*, 251 U. S. 146, *Ruppert* v. *Caffey*, 251 U. S. 264. Use of authority under the war power act must be carefully watched by the courts to prevent abuse in their exercise. The action of the attorney general in the instant case is evidence of the abuse of authority. If we are to follow the reasoning of the attorney general to its logical conclusion, what would prevent the attorney general from reaching into the pocket of a German tourist and taking cash found on his person while vacationing in this country? Following his reasoning still further, what would prevent him at this time to vest every credit that German nationals have in this country as a result of trade balances? Such an exercise of purported authority would destroy all trade with Germany and would nullify the foreign policy followed by other departments of the government. The seizure in 1949 is unconstitutional and void. The idea we are still at war with Germany in the sense contemplated by the statute is a pure fiction. German aliens could not now aid the German government in war hostilities against this country. There is no central government or authority in Germany capable of accepting the responsibility of the administration of the country and the compliance of the victorious powers. On March 15, 1948, the president of the United States told Congress that "almost three years have elapsed since the end . . . of the war with Germany." H. doc. 569, p. 1. It is nothing but a pure fiction to say we were at war with Germany in 1949. The time has come for the courts to set at rest the idea that the judiciary cannot inquire into an unwarranted and unnecessary seizure.

CONCLUSION.

Since the opinion of the Supreme Court of Illinois is contrary to decisions of this court and the federal questions are substantial and will affect many more persons than the litigants and the federal constitution is directly involved and it is the right of this court to resolve these problems, it is respectfully submitted that a writ of certiorari be granted.

Dated this 15th day of February, 1952.

Respectfully submitted,

ROLAND TOWLE,
Counsel for Petitioners.